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No. 688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellant, St. Louis Southwestern Railway Company (Cotton Belt), appeals from the final judgment and decree of the United States District Court for the Northern District of Illinois, Eastern Division, which sustained a report and related orders of the Interstate Commerce Commission (Commission), and submits this Statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinions of the district court, majority and dissenting, (Appendix 1)[1] are not reported. The report of the Commission (Appendix 2) is printed at 327 I.C.C. 279.

JURISDICTION

This action was brought before a three-judge district court under 28 U.S.C. §§1336, 1398, 2284, 2321-2325, and 5 U.S.C. §1009 to set aside orders of the Commission in *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company*, Finance Docket No. 21755. The final judgment of the three-judge court (Appendix A hereto) was entered on August 4, 1966. Appellant filed its Notice of Appeal in that court on September 27, 1966.

The jurisdiction of the Supreme Court to review the judgment of the district court by direct appeal is conferred by 28 U.S.C. §§1253 and 1201(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case, *I.C.C.* v *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963); *Gilbertville Trucking Co.* v *United States*, 371 U.S. 115 (1962).

STATUTES INVOLVED

Sections 5(2) and 5(4) of the Interstate Commerce Act (49 U.S.C. §§5(2), 5(4)), Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. §§ 1007(b) and 1009(e)), and Section 23 of the New York Personal Property Law are set forth in Appendix B hereto.

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[1] Appendices 1 and 2 are printed in a separately bound volume, captioned *Illinois Central Railroad Company* v. *United States of America, St. Louis Southwestern Railway Company* v. *United States of America* and *Monon Railroad* v. *United States of America.*

Particularly involved is the construction of the following portions of Sections 5(2) and 5(4) of the Interstate Commerce Act:

Sec. 5 . . .

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) . . . for any carrier, or two or more carriers jointly, . . . to acquire control of another through ownership of its stock or otherwise . . .;

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon . . . a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable:

* * *

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue

> to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control" or "management" shall be construed to include the power to exercise control or management.

Also involved is the application of the following section of the New York Personal Property Law:

> Sec. 23. Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereto heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

QUESTIONS PRESENTED

The questions presented by this appeal arise from a judgment of the district court sustaining a report and orders of the Commission in a proceeding entitled *Missouri Pacific Railroad Company—Control—Chicago & Eastern Illinois Railroad Company,* Finance Docket No. 21755. The Commission's orders granted the application of the Missouri Pacific Railroad Company (MoPac) under Section 5(2) of the Interstate Commerce Act for authority to control the Chicago & Eastern Illinois Railroad Company (C&EI), discontinued the Commission's investigation of the MoPac's violation of Section 5(4) in purchasing C&EI securities without obtaining prior Commission approval, and denied petitions to reopen the record to receive evidence of changes in circumstances which occurred after the close of the hearing.

The following questions are presented:

1. Did the district court err in sustaining, as based upon a correct interpretation of law and as supported by rea-

soned findings and substantial evidence, the Commission's conclusions: (a) that the MoPac's initial violation of Section 5 (4) of the Interstate Commerce Act was not "flagrant", and (b) that the MoPac's violation of Section 5(4) was terminated when it transferred its C&EI securities to an "irrevocable trust" in which it was the sole beneficiary?

2. Did the district court err in sustaining the Commission's interpretation of the Interstate Commerce Act that, upon a finding that the control for which approval is sought has already been acquired without Commission approval in violation of Section 5(4), the Commission is without power to "summarily" deny an application under Section 5(2) of the Act?

3. Did the district court err in holding that the Commission did not abuse its discretion in refusing to reopen the record to receive evidence that additional securities of the C&EI were acquired by the MoPac without Commission approval after the Commission hearing was completed?

4. In view of the Commission's conclusion that the necessity to place control of the C&EI in the hands of a strong railroad so as to cure its "financially weak and physically deficient" condition as of 1961 was an immediate public interest consideration which outweighed the public interest considerations involved in MoPac's illegal acts, did the court err in sustaining the Commission's denial of petitions to reopen the record to receive evidence that the financial and physical condition of the C&EI had so radically improved in the years 1962 through 1965 as to change the facts upon which the Commission based its weighting of the competing considerations?

STATEMENT

From July, 1959 to December, 1960, the Chairman and the President of the MoPac negotiated with the President of the C&EI for a merger of those railroads or for control of the C&EI by the MoPac. The C&EI rejected the MoPac's last offer in December, 1960, but the MoPac continued to contemplate C&EI merger or control. In 1960 and into August of 1961, the Louisville and Nashville Railroad also engaged in merger discussions with the C&EI; and in that period the Chicago and North Western Railway, the New York Central Railroad and the St. Louis-San Francisco Railway each showed an "interest" in the C&EI.

In late July 1961, the Hammack estate, which owned a block of C&EI securities, offered that block to several railroads which were believed to be interested in acquiring the C&EI. The Hammack securities included 31.4 percent of C&EI's outstanding Class A stock. The C&EI's charter made the consent of two-thirds of the Class A stock outstanding and voting necessary for mergers, leases or sales. The highest percentage of Class A stock voted at any recent C&EI stockholders meeting was 89.6 and the average voted was 80.3. The MoPac was aware that the purchaser of this stock would hold a practical veto over a potential merger between the C&EI and any other carrier.

On August 11, 1961, the MoPac purchased the Hammack securities for $1,400,000, an amount about 40 percent over their market value. The fact of the MoPac's purchase was made known to other railroads. Thereafter, the Louisville and Nashville Railroad ceased its consideration of merger with the C&EI, and the C&EI management had no further merger overtures from any other railroad.

On September 19, 1961, the MoPac filed an application with the Commission in Finance Docket No. 21755 for authority under Section 5(2) to control the C&EI.

On April 20, 1962, over eight months after its purchase of the Hammack securities, the MoPac created a trust with the Marine Midland Trust Company of New York as trustee and the MoPac as sole beneficiary, and transferred title to its C&EI holdings to the trustee. The trust was denominated "irrevocable" on its face and by its terms was to remain in effect until (1) the sale of all the securities by MoPac; or (2) the delivery to the trustee of an order of the Commission authorizing MoPac's control of C&EI or authorizing the release of the securities; or (3) the passage of 10 years.

Hearings were conducted before the Commission on a common record in both the application of the MoPac for control and a companion application by the Illinois Central (I.C.) for control of the C&EI (Finance Docket No. 21892), and also in an investigation initiated by the Commission on its own motion to determine whether the MoPac had violated Section 5(4) of the Act by acquiring control of the C&EI without authority from the Commission (Finance Docket No. 21980). This appellant was a party to the Commission's proceedings. The hearings were concluded in June of 1962.

Between November, 1963 and February, 1964, the MoPac executed agreements with Eastman Dillon, Union Securities & Co., and Dempsey-Tegler and Co. which gave it the power to purchase $4,878,000 in C&EI's convertible bonds, giving MoPac access to 32 percent of C&EI's common stock through the bonds. No authority was received by the MoPac from the Commission for these transactions, all of which were carried on after the hearings

were concluded but while the MoPac's application was still being processed by the Commission. On February 20, 1964, after executing its options, the MoPac transferred title of the bonds to its trustee the Marine Midland Trust Company. On August 20, 1964 and August 31, 1964, the I.C. and the Commission's Bureau of Inquiry and Compliance petitioned the Commission to reopen the record to show that the MoPac had acquired these additional securities of the C&EI without Commission authority.

By report and order served on March 8, 1965, the Commission issued its decision granting authority to the MoPac to control the C&EI, denying the I.C.'s similar application for control, and discontinuing its investigation of the MoPac's illegal purchases of the C&EI securities.

The Commission expressly found that the MoPac had violated Section 5(4), since it "clearly possessed, by virtue of its direct holdings of Eastern's class A stock during the 8 months preceding the creation of the trust in April 1962, the power to prevent a two-thirds majority of such stock from being voted at any stockholder meeting . . .; and as a result, it would have been able to block stockholder assent to, and thereby prevent Eastern from accomplishing, various corporate transactions such as mergers, leases and sales." (App. 2, pp. 83a-84a) It further found that the trust into which MoPac transferred its securities "during its term, is irrevocable" (App. 2, p. 86a); that "By its terms, the trust was adequate to divest Missouri Pacific of any power it might possess to control or manage the affairs of Eastern in a common interest with its own through the ownership of the Eastern securities originally deposited with, or later acquired by, the trustee" (App. 2, p. 87a); and therefore, that "from after the time the trust arrangement was put into effect, Missouri Pacific has had neither control nor power to control the affairs of Eastern." (App. 2, p. 87a)

The Commission held that its disposition of the trust issue rendered "moot the issues raised in the petitions filed by Illinois Central and the Bureau wherein further hearing is sought for the purpose of establishing that, by its trustee's acquisition of additional of Eastern's stock and convertible bonds subsequent to the hearing, Missouri Pacific and persons associated with it have acquired the power to control Eastern." (App. 2, p. 89a)

The Commission further concluded that "Even though we find a statutory violation through the unlawful acquisition of control [apparently referring to the eight-month period preceding the creation of the trust], we are not free to summarily deny Missouri Pacific's application." (App. 2, p. 89a) It "observed" that several "restraining measures self-imposed" by MoPac showed that none of the acquired power to control the affairs of Eastern was actually exercised, and gave as one example the MoPac's acquiescence in the decision of the Hammack appointed directors to serve out their terms. The Commission made no findings on the evidence which showed that the Missouri Pacific was aware that other railroads were discussing merger with the C&EI prior to MoPac's purchase of the Hammack securities and that the MoPac was aware that by merely taking title to the Hammack securities it thereby took unto itself the power to veto any merger by the C&EI. Nor did the Commission make any findings on the evidence which showed that after MoPac's purchase of the Hammack securities all merger discussions ceased between the C&EI management and the other railroads.

Finally, the Commission held that "denial of the applications herein, on whatever ground, would leave Eastern independent, as a relatively small, financially weak, and

physically deficient railroad" (App. 2, pp. 90a-91a), that the need of present-day railroading "makes it essential that Eastern have access to revitalizing resources outside of itself", and that the MoPac's application afforded the Commission the "opportunity to approve remedial proposals capable of preventing a recurrence [of bankruptcy], at least in the foreseeable future." (App. 2, p. 91a) Based on this consideration, the Commission approved the MoPac's application for control, notwithstanding the Commission's findings that the MoPac had violated the control provision of the Act.[2]

The I.C. brought an action in the District Court for the Northern District of Illinois to set aside the report and orders of the Commission. The Monon Railroad and the Cotton Belt intervened as parties plaintiff. The MoPac, C&EI and one of its stockholders, and the Louisville and Nashville Railroad intervened as defendants in support of the order. The Commission's order was enjoined pending a final decree by the court. In a two to one decision, the court sustained the report and orders of the Commission. After the final decree of the court, the Commission reinstated but then postponed the effective date of its orders.

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[2] The Commission prescribed, as a condition of MoPac control, that MoPac take steps necessary (1) to cause C&EI to negotiate with the Louisville and Nashville Railroad for purchase of the C&EI's Evansville line, and (2) to provide temporary operation by Louisville and Nashville over the Evansville line. This appellant raises no issue directed to the validity of these rulings.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In light of the current wave of railroad control, consolidation and merger applications before the Interstate Commerce Commission, it is particularly important that the Commission, the railroad industry and the financial community know the powers and duties of the Commission under Sections 5(2) and 5(4) when one railroad obtains control of another prior to Commission approval and later seeks to avoid the consequences of its illegal act by transferring the ownership of the controlling securities to a voluntary trust in which it is sole beneficiary.

This case presents the further significant question of whether the Commission has unlimited discretion to deny petitions to reopen, even petitions which proffer evidence that the underlying factual predicate of a decision has been destroyed.

Also presented is the question whether the Commission discharges its obligation under Section 8(b) of the Administrative Procedure Act when, as here, it fails to make findings on significant factual matters presented in the record.

I.

The district court held that the Commission did not err when it found that there were mitigating circumstances in the MoPac's illegal acquisition of the Hammack interests.

It is not disputed that at the time MoPac made its illegal purchase it was interested in either merger with C&EI or in gaining control of C&EI and that it was aware that its power to achieve either objective was in jeopardy because competing railroads were engaged in merger discussions with the C&EI. Nor is it disputed that the MoPac knew that it could put an end to this threat by purchasing the Hammack securities. Indeed, the President of the MoPac

told the President of the C&EI that the Missouri Pacific had purchased the Hammack securities "to prevent them from falling into unfriendly hands such as the North Western, L&N, or the Southern." (Com. Tr. 2285)[3] Nor is it disputed that MoPac's course of action has been successful in stopping all merger discussions by competitors.

The Commission made no findings on these undisputed facts of record. Rather, in determining whether or not the MoPac's violation was flagrant, it considered only whether MoPac took any overt acts to interfere in the management of the C&EI. Under the circumstances here presented, whether or not the MoPac attempted to exercise management control is wholly beside the point in evaluating MoPac's illegal acts. The MoPac fully accomplished its purpose when it deliberately obtained the power to veto, by inaction, a merger of the C&EI with the other railroads which were actively considering such a step. The Commission's initial error, therefore, is its failure to make reasoned findings, as required by Section 8(b) of the Administrative Procedure Act, which would show that it considered such material facts. Had it considered and made findings on the above undisputed evidence of record, it could only have concluded that the violation was flagrant.

II.

The district court also sustained the Commission's conclusion that the MoPac's transfer of the illegally acquired securities to an irrevocable trust terminated MoPac's illegal control. In concluding that the MoPac's transfer of these securities to the trust terminated the offense, the Commission limited its consideration to the language of the trust instrument itself which purported to provide that the trust was "irrevocable". From all that appears in the

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[3] Com. Tr. refers to the certified record of the proceedings before the Commission which are part of the record transmitted to the Clerk of this Court.

Commission's report, the Commission gave no consideration to the law which governs whether a trust which has the settlor as its sole beneficiary is irrevocable. In limiting its consideration to the face of the trust instrument, it ignored the pertinent statutory and case law which provide that a settlor-sole beneficiary can revoke such a trust at will.

The district court excused this failure on the ground that the Commission was not concerned with whether the instrument was irrevocable as a matter of law, but was concerned with the practical "success" and "effectiveness" of the trust to divorce MoPac from power of control (p. 17).[4] In reaching this conclusion, the district court

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[4] The district court also indicated that it might have sustained the Commission, had it interpreted the Commission's report as concluding that the trust is irrevocable as a matter of law. The court said:

> It may well be that having asserted irrevocability to the Commission to protect itself, MoPac was estopped from changing its position and asserting elsewhere that the trust was revocable. *Compare Hearst* v. *American Newspapers,* 51 F. Supp. 171 (D.Del. 1943). Under the circumstances of this case, the trust might be considered irrevocable. (App. 1, p. 10a)

Judge Campbell, in his dissenting opinion, concluded that the trust was legally revocable. The majority cites *Hearst* v. *American Newspapers,* 51 F. Supp. 171 (D.Del. 1943), which holds only that a court will enforce a loan agreement, made after a trust agreement, which bars revocation of the trust. In any event, the *Hearst* case involved the interpretation of Delaware law, not the law of New York, which is here applicable. See *Warner* v. *Florida Bank & Trust* Co., 160 F.2d 766, 772 (5th Cir. 1947); *Noble* v. *Rogan,* 49 F. Supp. 370, 371 (S.D. Cal. 1943); and *Restatement of the Law of Conflicts of Laws,* §297. Under New York law, the revocability of trusts is governed by statute, *Guaranty Trust Co. of New York* v. *Howe,* 86 N.Y.S. 2d 808, 813 (1948) and *Pulsifier* v. *Monges,* 66 N.Y.S. 2d 367, 368 (1946), which provides that the settlor and beneficiaries may revoke a trust. *New York Personal Property Law,* §23. Finally, since revocability is a question of law, representations of the MoPac on the legal effect of a trust cannot operate as an estoppel. *Uhlmann Grain Co.* v. *Fidelity & Deposit Co.,* 116 F. 2d 105 (7th Cir. 1941).

said that since the Commission had plenary power over MoPac, it is "beyond reasonable comprehension to suppose that MoPac would revoke this trust prior to gaining Commission approval." (App. 1, p. 13a) The court does not explain why it is "beyond reasonable comprehension to suppose" that MoPac, which had illegally acquired and held control of the C&EI for eight months, would be so overawed by the Commission's power as not to hold or exercise such control for its own benefit at some later date. There is no indication in the Commission's report that this inventive speculation was the Commission's rationale. There are no findings in the report to suggest that the Commission even considered the matters relied upon by the court. Thus, the lower court clearly erred in resting its holding on grounds not advanced by the Commission. The Commission's report must stand or fall on the findings which it made. *Securities and Exchange Com.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-9 (1962)

The justification for the doctrine of administrative law that a reviewing court cannot supply findings for the administrative body is well illustrated in this case. By attempting to reach beyond the scope of the Commission's report, the district court erred in its understanding of the facts. Viewed in practical terms of success or failure, the trust was a failure. As late as January 14, 1965, the C&EI publicly acknowledged that the MoPac still had a practical veto over a C&EI merger with other railroads. Counsel for the C&EI expressed the facts in the real world when he then stated in oral argument to the Commission: "Our hands are tied. We can't talk to anyone." (Com. Tr. 5938) The practical reasons why there could be no negotiations between C&EI and other roads looking to merger are apparent on a moment's

reflection. So long as there is a reasonable doubt concerning the revocability of the trust, prudent C&EI management would not dare discuss merger with a road other than MoPac and prudent management of an outside railroad would not waste its time and resources on such discussions. Thus, MoPac continued to accomplish its unlawful objectives, after, as well as before, its execution of the "irrevocable" trust.

Whether an "irrevocable" voting trust insulates a carrier from what would otherwise be a violation of Sections 5(2) and 5(4) of the Interstate Commerce Act raises a question of general and substantial importance. In a situation where two competing carriers are vying for the control of a third as a means of enabling them to reach an important terminal or gateway point, it can readily be seen that one carrier, by purchasing sufficient securities to veto control by the other carrier and placing them in a voting trust for a period of ten years, could effectively frustrate any effort by the other to acquire control. Moreover, if the Commission were subsequently to approve an application for control, the settlor-sole beneficiary of the trust would have the advantage of already owning the necessary shares. On the other hand, if the Commission should deny its application for control, it has had the benefit of eliminating new competition for a considerable period of time which, if the Commission and the court are correct as to the lawfulness of settling such trusts without authority from the Commission, can be continued indefinitely. By sanctioning this voting trust device, the Commission and the court have frustrated the important purposes of Section 5 of the Interstate Commerce Act. Such ruling, if allowed to stand, would present an invitation for similar future action by other railroads.

This effect of the district court's decision is not mere speculation. The Commission's decision has already had this effect. The Chesapeake & Ohio Railway has purchased or contracted for well over 50 percent of the stock of the Chicago South Shore & South Bend Railroad without approval of the Commission. It claims insulation from a violation of Section 5(4) because it transferred title in the stock to a trust in which it is the settlor-sole beneficiary. In a report issued after the court's opinion, *Chesapeake & Ohio Railway Co.—Control—Chicago South Shore & South Bend Railroad,* Finance Docket No. 23566, the Commission's Examiner follows the rule of the instant case and gives his blessing to the trust device. The spreading use of the trust device will soon make a farce of the prohibition in Section 5(4) of the Interstate Commerce Act against acquiring control without prior Commission approval.

III.

The Commission interpreted Section 5(2) of the Act as requiring that it give consideration to possible benefits of MoPac's control of the C&EI, saying "even though we find a statutory violation through the unlawful acquistion of control, we are not free to summarily deny Missouri Pacific's application." (App. 2, p. 89a)

The district court accepted this limited view of the Commission's power. Such a reading of the Interstate Commerce Act does not square with the views of this Court as stated in *Gilbertville Trucking Co.* v *United States,* 371 U.S. 115 (1962). In that case, the Commission denied an application under Section 5(2) for merger on the ground that the applicants had engaged in illegal acts of management in a common interest, contrary to Section 5(4). In its appeal, the applicant contended that the Commission's decision was arbitrary in denying approval of control on

that ground. In ruling on that contention, this Court said in a unanimous decision:

> However, even an automatic rule is not necessarily arbitrary. As already noted, § 5(4) is integral to the success of the regulatory scheme. To approve a merger in the face of a §5(4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a fait accompli or avoid its jurisdiction altogether. [p. 128].

Had the Commission here understood that it had the power summarily to disapprove the MoPac's application, it might well have held, after a proper evaluation of the degree of flagrancy of the MoPac's violation of Section 5(4), that MoPac's Section 5(2) application should be denied.

The recurring question of the Commission's power to deny applications summarily upon a finding of illegal acquisition of control should be ruled upon by this Court.

IV.

Four separate petitions were filed with the Commission requesting that it reopen the record to receive evidence on matters occurring after the close of the record. Two of the petitions, one filed by the Illinois Central and the other by the Commission's Bureau of Inquiry and Compliance, sought to show that the MoPac had acquired a majority of the voting stock after the close of the hearings and that it had thereby obtained power to control management decisions as well as to veto mergers. The other two petitions, one filed by the Chicago and North Western Railway and the second by the Cotton Belt, sought to reopen the record so that the Commission might receive evidence

on the sharp improvement in the financial and physical condition of the C&EI subsequent to 1961.

The petitions addressed to the MoPac's acquisition of additional securities which gave it majority control were denied by the Commission solely on the ground that the issue was "moot" in light of its determination that the trust into which the Commission said these additional purchases were transferred was "irrevocable". The district court found that these securities were held outside the trust for some time, but upheld the Commission by putting words in the Commission's report which are not there. The court said that:

> . . . the Commission was entitled to consider not only the mathematical power, if any, inherent in this quantity of stock, but also the conditions under which MoPac had access to it. While MoPac tread close to the line of another §5(4) violation, we cannot hold that the Commission clearly abused its discretion in finding no sufficient new §5(4) violation raised by the facts stated in the petitions. Although we may disagree with this ruling, our scope of review is limited to determining whether there is warrant in the law and facts for the result reached (App. 1, p. 21a).

The Commission did not consider "the conditions under which MoPac had access" to the additional stock; nor did it find that there was not a "new Section 5(4) violation". It refused any consideration of the petitions solely on the ground that its disposition of the trust issue mooted the questions raised by the petitions to reopen. Once the district court concluded that the securities were held outside the trust, then on its own theory of the proper basis for a Commission decision it should have remanded the case to the Commission for the Commission to make the kind

of evaluation which the district court said the Commission made, but which it in fact did not make.[5]

V.

The Commission also denied the petitions of the Chicago and North Western Railway and Cotton Belt to reopen, even though those petitions, if granted, would have destroyed the predicate for the Commission's conclusion that public interest considerations dictated that it approve MoPac control of the C&EI. The Commission expressly found in its report that denial of the application would leave the C&EI as a "financially weak and physically deficient railroad" and that control by MoPac would provide an immediate remedy "capable of preventing a recurrence [of bankruptcy], at least in the foreseeable future." (App. 2, p. 91a)

The Commission's expressed fear that disapproval might make it an accomplice in C&EI's bankruptcy was based upon the condition of the C&EI as of 1961. The evidence proffered in the petitions to reopen the record showed that between 1962 and 1965 the C&EI had become rehabilitated both physically and financially. Its traffic volume was up 19 percent over 1961; its freight revenue was up 24 percent; its net income was $1,736,000 in 1965 as contrasted with a net loss in 1960 of $996,000 and a net income in 1961 of only $300,000; its working capital was a comfortable $2,631,000, in contrast to a negative position of $2,437,000

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[5] In his dissenting opinion, Judge Campbell properly stated that the proceeding should be remanded to the Commission "to review and make findings as to the facts surrounding the Dempsey-Tegeler and Eastman-Dillon convertible bond purchases, specifically inquiring into the length of time the bonds were held and to whom they were sold." (App. 1, p. 33a)

in 1961; its divisions with connections, all of which are carried down to net income, increased $425,000 per annum; its common stock increased in value by 200 percent, and it issued new common stock in 1965, the first issue of equity stock by any railroad since the Great Depression. On the physical side, the C&EI accomplished substantially all of the improvements which witnesses suggested were essential to restore its plant facilities. Judge Campbell said in his dissenting opinion that "the significance of this information cannot be questioned and I would have the Commission reopen the record to give it proper consideration." (App. 1, p. 32a)

These dramatic improvements in the condition of the C&EI show a striking parallel to the kind of change in economic circumstances which led this Court to hold in *Atchison, T. & S.F. R. Co.* v. *United States,* 284 U.S. 248 (1932), that the Commission should have reopened that proceeding. In that case, the petition to reopen offered to show that since the close of the record the revenues and car loads of the carriers had declined 15 percent (as compared to a 24 percent increase in C&EI revenues), their operating net income had been severely reduced, their credit standing had been impaired, and the market price of their stock had so declined as to preclude equity financing.

In denying the Cotton Belt's petition, the Commission relied on *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503 (1944), which upheld the Commission's refusal to reopen a proceeding to receive new evidence. In that case, this Court said that *Atchison* has been "restricted . . . to its special facts . . . and it stands virtually alone" [p. 515]. The facts offered by the Cotton Belt in the instant case are the same kind of "special facts" offered in *Atchison.* Thus, the instant case cannot be distinguished

from *Atchison*. If the Commission has not abused its discretion in the instant case, *Atchison* is no longer the law. Before this Court decides whether it should overrule *Atchison*, it should have the benefit of plenary consideration, so that it may understand the consequences of giving an administrative agency unlimited power to ignore subsequent events which, if considered, would render its findings invalid as unsupported by existing facts.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, and the case should be set for full hearing on the merits.

Respectfully submitted,

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October 1966

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 65 C 1393

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD and ST. LOUIS SOUTHWESTERN RY.,
Plaintiff and Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LEON LEIGHTON,
Defendants and Intervening Defendants.

DECREE

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having reviewed the evidence and having considered the briefs and arguments of counsel for the parties, and having rendered and filed its opinion herein, and being fully advised in the premises,

IT IS ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission entered in Finance Docket Nos. 21755, 21892 and 21980 on February 16, 1964, be, and it is hereby, affirmed.

Enter:

Elmer J. Schnackenberg
Circuit Judge
Bernard M. Decker
District Judge

Dated: August 4, 1966.

APPENDIX B

A. Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, provides:

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise: or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the

public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this para-

graph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

B. Sections 8(b) and 10(e) of the Administrative Procedure Act, 5 U.S.C. 1007(c) and 1009(e), provide:

8(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

10(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right,

power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

C. Section 23 of the New York Personal Property Law provides:

Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.